Filed 11/17/03

CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. BERT GENE ROBERTSON, Defendant and Appellant.	F040143 (Super. Ct. No. 57333) **OPINION**

APPEAL from a judgment of the Superior Court of Tulare County. David L. Allen, Judge.

Mark Alan Hart, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Jo Graves, Assistant Attorney General, Stan Cross and Susan Rankin Bunting, Deputy Attorneys General, for Plaintiff and Respondent.

* Pursuant to California Rules of Court, rules 976(b) and 976.1, this opinion is certified for publication with the exception of the Facts and parts II and III of the Discussion.

Defendant Bert Gene Robertson was found guilty of five sex crimes against CS and one sex crime against SM. The crime against SM was charged under the authority of Penal Code section 803, subdivision (g), a special supplementary statute of limitations for certain sex crimes against minors.[1] In the published portion of this opinion, we reject defendant's claim that section 803, subdivision (g) violates ex post facto and due process and, even if constitutional, did not have retroactive effect until 1997. Defendant also argues the evidence is insufficient to satisfy the corroboration requirement in section 803, subdivision (g), and the trial court erred in admitting evidence of uncharged prior sexual offenses and in giving a related jury instruction. We affirm.[2]

PROCEDURAL BACKGROUND

Defendant was charged in count 1 with a lewd and lascivious act with a child under the age of 14 against SM occurring between January 1, 1990 and November 30, 1991. (§ 288, subd. (a).) It was alleged that the statute of limitations for this crime had been extended pursuant to section 803, subdivision (g). Counts 2, 3, 5 and 6 alleged a lewd and lascivious act with a child 14 or 15 years of age where the defendant is at least

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[1] All future code references are to the Penal Code unless otherwise noted.

[2] While this case was pending in this court, we received a request from defendant to dismiss this appeal. The basis asserted for the request is defendant's claim that following a request by the district attorney the trial court modified the judgment pursuant to *Stogner v. California* (2003) 539 U.S. ____[123 S.Ct. 2446] (*Stogner*) dismissing count 1 and resentencing defendant on the remaining counts. Because the issues raised on appeal involve only count 1, defendant claims the appeal is moot. We deny the request for dismissal. First, any action by the trial court after jurisdiction was properly established in this court is not properly before us. Second, as evidenced by our discussion in the published portion of this case, our decision regarding the viability of count 1 is clearly in conflict with the reasoning for the purported dismissal in the trial court; thus we find that the matter is one of continuing public interest and is likely to recur. We exercise our discretion to resolve the legal issues raised. (*People v. Eubanks* (1996) 14 Cal.4th 580, 584, fn. 2.)

10 years older than the victim. (§ 288, subd. (c)(1).) In count 4 defendant was charged with an act of sexual penetration with a person under the age of 16 and a defendant over the age of 21. (§ 289, subd. (i).) It was alleged as to all counts that the crimes involved multiple victims. (§ 1203.066, subd. (a)(7).)

Prior to trial, defendant filed a motion to set aside count 1 of the information based on the extension of the statute of limitations pursuant to section 803, subdivision (g). The trial court denied the motion. Defendant objected to the admission of prior uncharged acts against SM. The trial court allowed the evidence to be admitted.

The jury found defendant guilty of counts 1 through 5 and not guilty on count 6. It found the multiple-victim allegation to be true. Defendant was sentenced to prison for a total term of eight years, eight months.

FACTS[*]

Leanne S. dated defendant from June to August of 1999. Leanne had a 14-year-old daughter, CS. One morning in August, CS woke up early and defendant was at her bedside. He asked her if she had done anything with her boyfriend. He told her to lie on her back and he would show her what her boyfriend could do. He pulled up her shirt and rubbed her stomach. He then put his hand up her shirt and rubbed her breasts. (Count 2.) CS moved defendant's hand away from her breasts and shook her head no. He then rubbed her stomach again and tried to put his hand into her shorts. (Count 3.) CS pulled his hand away. Defendant told CS to get up and get ready for her acting class.

Defendant drove CS in his car to her acting class. During the drive he talked about masturbation. He tried to rub her vagina in the car. She pulled his hand away. CS was scared.

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[*] See footnote on page 1, *ante*.

After picking CS up from her class, defendant drove her to his apartment. While at the apartment, defendant showed her a doll. When the doll's beard was lifted, a penis was exposed. Defendant bought CS a pair of shoes and gave her money.

The next morning CS woke up and defendant was on her bed. Leanne was at work. Defendant told CS to roll over so he could massage her back. CS pretended to fall asleep hoping that defendant would leave. CS was afraid. Defendant put his hands in her pants and put his finger into her vagina. (Count 4.) CS rolled over and defendant tried to put his hand in from behind. (Count 5.) CS rolled over again and pretended to wake up. She told defendant she had a bad dream. Defendant said he was just rubbing her back. Defendant returned and asked CS if she wanted to see "it." He pulled his penis out of his pants. CS turned her head away. Defendant asked to "see hers." She said no. Defendant told her to get ready and asked her not to tell anyone.

CS told her boyfriend what had happened. He told her she should tell her mother. She did and her mother took her to talk to law enforcement. CS did not know SM.

Bob Willis, a criminal investigator, was investigating defendant. When he interviewed CS, she said that defendant grabbed her hand and asked her to touch his penis; she pulled her hand away. Willis contacted defendant's former wife, Janice M., and asked her if there were any allegations of molestation by defendant against her daughters during their marriage. She said no. Willis asked her to contact her daughters and ask them if defendant ever touched them in a way that made them feel uncomfortable. As a result of this conversation, Willis spoke to SM.

SM was born in 1977. Her mother dated defendant and then was married to him from 1985 to 1995. Before Janice and defendant were married, defendant would grab SM's buttocks. When her mother was gone, defendant would take SM to the mother's bedroom and touch her privates. After the marriage, defendant would come into SM's bedroom and touch her vagina. He made SM touch his penis by placing her hand on it. Defendant put his mouth on SM's vagina when they lived on Thousand Oaks. They

moved to a two-story home on Inyo Street in Tulare County. Defendant would come upstairs into SM's bedroom late at night. She would wake up to find that he was touching her vagina with his fingers. (Count 1.)

SM's mother, Janice, testified that when they lived on Inyo Street, Janice and defendant's bedroom was downstairs. Janice would awaken in the night and find that defendant was not in bed with her. When she went looking for him, she would find him upstairs in SM's room standing over her bed. She remembers one occasion when she asked him what he was doing. He said he smelled smoke and was checking on it. Janice said she found defendant in SM's bedroom at all three houses.

Defense

Defendant testified on his own behalf and denied molesting either girl. He thought that SM was angry with him because he caught her ditching school and took her to the principal's office. On another occasion, he caught her at home with boys in the house. He said he went to SM's room when he smelled smoke.

DISCUSSION

I. Ex Post Facto

Defendant was charged and convicted in count 1 of a lewd and lascivious act (§ 288, subd. (a)) against SM occurring between January 1, 1990 and November 30, 1991. In 1990 and 1991 (and unchanged to date), the punishment for a violation of section 288, subdivision (a) was three, six, or eight years. Pursuant to section 800, because this offense is punishable by eight years or more in prison, the statute of limitations is six years.

Count 1 was charged pursuant to section 803, subdivision (g), a special supplementary statute of limitations for certain sex crimes against minors. Section 803, subdivision (g) as originally enacted went into effect on January 1, 1994. It provided in part that a "criminal complaint may be filed within one year of the date of a report to a law enforcement agency by a person of any age alleging that he or she, while under the

age of 18 years, was the victim of a crime described in Section 261, 286, 288, 288a, 288.5, 289 or 289.5."

The original legislation did not expressly state whether or not the enactment was retroactive. In 1995 and 1996, some appellate courts issued decisions finding that section 803, subdivision (g) should not be given retroactive effect. In response to these decisions, section 803, subdivision (g) was amended in 1996, going into effect on January 1, 1997, expressly stating that a pleading could be filed within one year of a qualifying report even where the defendant acquired a statute of limitations defense before 1994. (*People v. Bunn* (2002) 27 Cal.4th 1, 7-8.)

In 1999, the California Supreme Court held that section 803, subdivision (g) could be applied retroactively without violating ex post facto principles. (*People v. Frazer* (1999) 21 Cal.4th 737.) In 2003, the United States Supreme Court held that section 803, subdivision (g), as applied to crimes that were already time-barred when the section was enacted, violates ex post facto principles. (*Stogner*, *supra*, 539 U.S. ___ [123 S.Ct. 2446].)

The parties filed supplemental briefing in this court after the *Stogner* opinion was issued. Defendant claims that although the statute of limitations for count 1 did not run until January 1, 1996,[3] a date after January 1, 1994, when section 803, subdivision (g) first went into effect, the statute was not made retroactive until January 1, 1997 when the 1996 amendment went into effect. He asserts that statutes of limitations are to be strictly construed in favor of the accused and this court should not assume that the statute, as originally enacted, applied to crimes committed before the statute's effective date, even

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[3] Although the charging period for count 1 ran from January 1, 1990 to November 30, 1991, we shall use the earliest date because it is not clear from SM's testimony the exact date of the crime. (*People v. Angel* (1999) 70 Cal.App.4th 1141.)

in cases where the statute of limitations had not expired on those crimes at the time the statute first took effect.

"While an intention to change the law is usually inferred from a material change in the language of the statute [citations], a consideration of the surrounding circumstances may indicate, on the other hand, that the amendment was merely the result of a legislative attempt to clarify the true meaning of the statute." (*Martin v. California Mut. B. & L. Assn.* (1941) 18 Cal.2d 478, 484.) Although the United States Supreme Court in *Stogner* disapproved of the California Supreme Court's holding in *Frazer* on the question of the applicability of ex post facto principles to an already expired statute of limitations, *Stogner* does nothing to questions answered in the *Frazer* opinion that do not have constitutional underpinnings. The question whether the legislative change in 1996 was a clarification of the previous statute or was intended to be a material change to the existing statute is purely a question of California law. The *Frazer* court found that the 1996 amendment was to repudiate the earlier Court of Appeal decisions finding that the statute was not retroactive and the "1996 amendment sought to 'clarify,' through express 'retroactivity' and 'revival' provisions." (*People v. Frazer, supra,* 21 Cal.4th at p. 753.) Thus the California Supreme Court held the 1996 amendment was a clarification of, not a change to, the original version of 1994. We are bound by that decision. (*Auto Equity Sales, Inc.* v. *Superior Court* (1962) 57 Cal.2d 450, 455.)

Stogner acknowledged that "courts have upheld extensions of *unexpired* statutes of limitations…." (*Stogner*, *supra*, 539 U.S. at p. ___ [123 S.Ct. at p. 2453.] Section 803, subdivision (g) was retroactive for instances of unexpired statutes of limitations at the time it was originally passed in 1994. Because the statute of limitations in count 1 had not expired when this section went into effect in 1994, the defendant was properly prosecuted under this new statute extending the statute of limitations.

II. Substantial Evidence of Corroboration*

In order to bring a charge under the provisions of section 803, subdivision (g) several criteria must be met. One of the criteria is that "there is independent evidence that clearly and convincingly corroborates the victim's allegation." (§ 803, subd. (g)(2)(B).)

The information in this case gave notice that count 1 was being brought pursuant to section 803, subdivision (g). The information stated, "There is independent evidence that clearly and convincingly corroborates the victim's allegations, to wit, the statement of another person [CS] who alleges sexual molest." The defendant unsuccessfully sought to dismiss count 1 on the ground that SM's testimony had not been corroborated. The trial court disagreed, finding that the testimony of CS sufficiently corroborated the allegations of SM.

Defendant claims the corroboration provided for count 1 was insufficient to meet the demanding standard of clear and convincing evidence of corroboration. He argues that the testimony of CS regarding the crimes against her did not share significant similarity and did not occur at the same time and thus did not provide corroboration of SM's testimony. He also asserts the testimony of SM's mother, Janice, that she found defendant in SM's bedroom was not sufficient to corroborate SM because Janice did not witness any crime and had no personal knowledge of any of the alleged crimes. Defendant argues that the conviction in count 1 must be reversed.

In *People v. Mabini* (2001) 92 Cal.App.4th 654, the court held that the corroboration required by section 803, subdivision (g) can be based solely on similar offenses against a different victim. In *Mabini,* the charged victim, Sheila, was molested by her grandfather while they lived in the same house from 1991 to 1994. Sheila was

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* See footnote on page 1, *ante*.

eight when the molestations began. Defendant would frequently touch Sheila's thigh and vaginal area, and when she was asleep he would pull down her underpants and put his finger inside her vagina. He would tell her not to tell anyone. Kayla C., Sheila's cousin, testified that in 1994, when she was six years old, defendant put his hand inside her underpants and rubbed her vaginal area. This incident occurred in the front yard of Sheila's home. Kayla's testimony was used as the sole corroboration for the child molestation count involving Sheila charged pursuant to section 803, subdivision (g). (*People v. Mabini, supra,* at p. 657.)

On appeal, the defendant argued that the testimony of Kayla C. was insufficient to provide clear and convincing corroboration of Sheila's accusations. The appellate court disagreed. "Evidence of similar offenses against an uncharged victim has a tendency in reason to prove a disputed fact that is of consequence to the determination of the section 803, subdivision (g), issue. (Evid. Code, § 210.) Consequently we hold that such evidence, if credited by the trier of fact, may standing alone constitute independent evidence that clearly and convincingly corroborates the victim's allegation.

"We review the record in the light most favorable to the judgment to determine whether a reasonable trier of fact could find that Sheila R.'s allegation was clearly and convincingly corroborated by evidence of appellant's molestation of Kayla C. [Citation.] We conclude that a reasonable trier of fact could so find. The offenses committed against Sheila R. and Kayla C. shared many similarities. Like Sheila R., Kayla C. was related to appellant. The offenses occurred at Sheila R.'s house during the three-year period that appellant was residing there. The girls were similar in age when they were molested. Moreover, the offenses involved similar behavior. Appellant touched the vaginal area of both girls. Accordingly, Kayla C.'s testimony, standing alone, constitutes sufficient corroboration to support the true finding on the section 803, subdivision (g), allegation." (*Peoplel v. Mabini*, *supra*, 92 Cal.App.4th at p. 659; see also *People v. Yovanov* (1999) 69 Cal.App.4th 392.)

We find the evidence sufficient to provide corroboration of the count 1 molestation against SM. Although separated in time, the molestations were sufficiently similar to provide corroboration. Defendant would date a mother with a daughter. After the relationship was established, he would begin molesting the daughter. He would enter the girls' bedrooms late at night or early in the morning when the girls were asleep. The offenses involved similar behavior. The fact that he first molested SM at a younger age and for a longer period of time does not substantially alter the probative value of the evidence. What is similar is that he molested each girl beginning shortly after he began a relationship with her mother and continued the molestations until the relationship ended. In addition, the testimony of SM's mother corroborated SM's testimony. Janice testified that she found defendant in SM's room by her bed several times in the middle of the night. It is not necessary, as defendant alleges, that Janice actually witness the crime or have personal knowledge of the crime in order to provide corroboration. There was sufficient evidence of corroboration.

III. Evidence of Uncharged Crimes*

Although defendant was charged with only one count involving SM, she testified to numerous sexual acts committed by defendant against her for several years. Defendant objected at trial to the admission of evidence of other acts that occurred when the family was not living in Tulare County. Defendant objected because the acts occurred outside of the jurisdiction and outside of the statute of limitations. The trial court ruled that the evidence was admissible to prove similar method, scheme, or intent. The district attorney argued to the jury that they could use the prior acts against SM as propensity evidence. The jury was instructed on propensity evidence.

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* See footnote on page 1, *ante*.

Defendant asserts that the trial court erred to his prejudice by allowing evidence of uncharged prior sexual offenses committed by him involving SM to be used as propensity evidence and by so instructing the jury with the 2001 revision of CALJIC No. 2.50.01. Defendant argues that it is improper to allow uncharged crimes to be introduced by way of the testimony of the victim of the charged crime.

Defendant argues that uncharged activity cannot be used as propensity evidence when the victim of the charged crime provides the uncharged activity evidence. Evidence Code section 1108 allows evidence of a defendant's commission of another sexual offense when the defendant is accused of a sexual offense. There is no requirement that the evidence of the other sexual offense must come from a different victim, and defendant has not cited any authority that supports such an assertion. The evidence is subject to an analysis pursuant to Evidence Code section 352. (See *People v. Hoover* (2000) 77 Cal.App.4th 1020 [trial court properly admitted prior instances of domestic abuse against the charged victim to corroborate the victim's testimony pursuant to Evidence Code section 1109].)

The determination of whether the evidence should be excluded pursuant to Evidence Code section 352 is entrusted to the sound discretion of the trial court. (*People v. Hoover, supra,* 77 Cal.App.4th at pp. 1028-1029.) Because the evidence here of similar conduct came from the victim herself, it was not unduly inflammatory. In determining defendant's guilt, the jury had to weigh defendant's credibility against the credibility of the victim; there was nothing in the testimony about prior incidents of sexual molestation given by SM that had any more credence than the testimony surrounding count 1. The evidence of prior acts was not remote, confusing or time-consuming. The trial court did not err when it admitted the evidence.

Defendant argues that instructing the jury pursuant to CALJIC NO. 2.50.01 violated due process. Defendant acknowledges that the California Supreme Court in *People v. Reliford* (2003) 29 Cal.4th 1007 found that this instruction is not likely to

mislead the jury concerning the limited purpose for which they may consider the evidence of prior uncharged crimes and the prosecution's burden of proof, but he asks that we not follow this opinion. First, he states that *Reliford* is not applicable to this case because the other-crimes evidence at issue in that case involved a different victim. We have rejected defendant's argument that a victim of sexual abuse may not corroborate herself with prior instances of sexual misconduct. Next, defendant claims that the concurring and dissenting opinion in *Reliford* is the correct approach. We must follow the majority opinion. (*Auto Equity Sales, Inc.* v. *Superior Court, supra,* 57 Cal.2d at p. 455.)

DISPOSITION

The judgment is affirmed.

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VARTABEDIAN, J.

WE CONCUR:

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DIBIASO, Acting P. J.

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CORNELL, J.